United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7673

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARION AITCHISON, et al.,

Plaintiffs-Appellees,

vs.

STEPHEN BERGER, et al.,

Defendants,

STEPHEN BERGER, Individually and as Commissioner of the Department of Social Services of the State of New York,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

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1. Where the Social Security Act and regulations thereunder require that Medicaid coverage for the medically needy, if provided, be extended to persons whose income, after the deduction of medical expenses, is below the public assistance level, whether New York's practice of compelling certain medically needy families to live below the cash public assistance level applicable to them violates federal law.
2. Whether compliance with the order below even arguably requires the violation of the "total dollar amounts" language of 45 C.F.R. §248.3(c)(1), inasmuch as defendants may comply with the order by exercising any of several concededly legal options, and whether, even if the order required the utilization of variable "spend-down" limits, whether such limits would be any less valid than New York's variable shelter allowances are under the AFDC program requirement that income allowances be expressed in "money amounts."
3. Whether either the discrepancy in New York between the income for maintenance which a medically needy Medicaid family is allowed and that which a categorically needy Medicaid family is allowed, or New York's policy of compelling certain medically needy medicaid families to "spend down" to a level far below the applicable public assistance level while at the same time allowing other medically needy Medicaid families

to live above the applicable public assistance level, based upon factors as unrelated to Medicaid as county of residence, family size, type of rental arrangement, and type of heating fuel, raises a "substantial" constitutional question under the Equal Protection Clause.

4. Whether, in a certified class action involving the administration of federally regulated and financed public welfare benefits and in which the defendants have conceded both that the "fund" so administered exceeds $300 million annually, and that a judgment for the plaintiffs would have a budgetary impact of millions of dollars per year, there is more than $10,000 in controversy within the meaning of 28 U.S.C. §1331.

POINT I

FEDERAL LAW AND REGULATIONS REQUIRE THAT INCOME ALLOWANCES FOR THE MEDICALLY NEEDY UNDER NEW YORK'S MEDICAL ASSISTANCE PROGRAM BE NO LESS THAN THE APPLICABLE PUBLIC ASSISTANCE PAYMENT STANDARD INCLUDING ACTUAL SHELTER COSTS UP TO A GIVEN COUNTY MAXIMUM.

Under New York's medical assistance program the Aitchisons and the class they represent* are allowed to retain income for their personal maintenance needs, e.g., rent, heat, food and clothes, at a level which is substantially below the payment and eligibility level for cash public assistance benefits under New York's Aid to Families with Dependent Children ("AFDC") program. In the case of the Aitchisons the discrepancy was $107 per month at the time the action was commenced (A-27, 85), and it was subsequently reduced to $53 per month at the time of the judgment below (A-261) by a combination of increases in the medical assistance allowances (Chs. 480 and 481 of the Laws of 1975), the removal of Michael Aitchison from consideration on the medical assistance budget** (A-133), and an increase in the maximum shelter allowance in Rockland County, where the Aitchisons

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* The court below granted class action relief and the defendant has not contested that determination in his brief (A-265, 290-291) (References preceded by "A" are to the Joint Appendix).

** Contrary to fn. ** at p.20 of the Commissioner's brief, Michael Aitchison was deleted not because he reached his majority but because he became self-supporting. (A-59).

reside (A-221). Not only does that problem exist in Rockland County, but there are some thirty-seven (37) other counties, plus all five boroughs of New York City, in which this disparity can exist at some or all family sizes (A-217).

It could not be more clear that this discrepancy between the medical assistance income allowances and payment and eligibility standards for public assistance is illegal. 45 C.F.R. §248.3(c)(1)(ii),* on which the judgment below principally relies, is simply the administrative embodiment of the requirements of the Social Security Act and Congress' intent in enacting the medical assistance program. It is the latest in a series of regulations, all of which have required that the medical assistance standards be no lower than the public assistance standards and which have been without exception so construed by the courts.

A. The Statutory Basis for the Federal Regulations and the Legislative History

The two statutory predicates for the federal regulations in question are 42 U.S.C. §§1396a(a)(10)(C)(i) and 1396a(a)(17). Section 1396a(a)(10)(C)(i) provides that medical assistance for the medically needy (those "who do not meet the income and resources requirements of [AFDC], or the supplemental security income program" ["SSI"]), shall be provided

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* Copies of relevant regulations and statutes are included in the appendix to this brief.

> to all individuals who would, except for income and resources, be eligible for aid or assistance under any such state plan [for AFDC], or to have paid with respect to them [SSI]. ... (Emphasis supplied).

It is uncontroverted that, but for their income and resources, the Aitchisons would be eligible for aid or assistance under AFDC at a payment standard of $370 per month, a sum $53 higher than the $317 allowed them under the medical assistance program. The Commissioner has studiously ignored this portion of section 1396a(a)(10), and it completely undercuts his argument.

Section 1396a(a)(10)(C)(i) then goes on to provide that medical assistance for the medically needy shall be provided if the recipients

> have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services.

That part of the statute requires simply that the insufficiency of income be determined after considering medical expenses, and that the insufficiency be measured against the AFDC eligibility standards.

So also 42 U.S.C. §1396a(a)(17) requires the use of standards "comparable for all groups." That section later on reiterates the criterion that medical assistance be available to persons "who would, except for income and resources, be eligible for aid or assistance in the form of money payments

under [AFDC, SSI, or other federally governed programs]." Cf. 42 U.S.C. §1396a(a)(10)(C)(i). Plainly eligibility standards are not "comparable" where a family receiving AFDC ends up with a monthly income of $370 plus medical assistance benefits while a similar family in terms of family size and shelter cost, the only variables in the AFDC benefit levels, is allowed only $317 per month income in order to get medical assistance.

In enacting the medical assistance program Congress clearly intended that the medically needy be eligible for medical assistance once their income for maintenance had been reduced to the eligibility level for cash public assistance. As the Court below pointed out (A-285), the Senate Report explained that under the program for the medically needy

> In no event ... may a State require the use of income or resources which would bring the individual's income below the amount established as the test of eligibility under the State plan [for cash assistance such as AFDC]. Such action would reduce the individual below the level determined by the State as necessary for his maintenance.

S. Rep. No. 404, 1 U.S. Code Cong. & Admin. News 1943, 2019 (1965). So also the Report stated: "the State must be sure the income of the individual has been measured in terms of ... the State's allowance for basic maintenance needs." (Id.) Plainly the income allowances used by New York do just what Congress intended to prohibit: the "test of eligibility under the State plan [for AFDC]" for the Aitchisons is $370 per month, not $317 per month;

the "level determined by the State as necessary for .. maintenance" of such a family is $370, not $317.

The Senate Report likewise explains the meaning of the requirement of section 1396a(a)(17) that standards be "comparable for all groups:"

> The determination of financial eligibility must be on a basis that is comparable as among people who, except for their income and resources, would be recipients of money for maintenance under the other public assistance programs. (Id. at 2017) (Emphasis supplied).

The fact is that "except for their income and resources," the Aitchisons "would be recipients of money for maintenance" at the level of $370 per month under AFDC,* not the $317 they are allowed under New York's medical assistance program.

It is quite apparent from both the two relevant sections of the Social Security Act, and from the legislative history that New York must, as the court below held, provide income

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* While 45 C.F.R. §248.3(c)(1)(ii)(B) allows use of either the SSI or AFDC standard, whichever is higher, irrespective of whether a medical assistance family would otherwise be in one category or the other, it is clear that the Aitchisons would fit under AFDC, and not SSI as the Commissioner's brief asserts (p.22). Neither Mrs. Aitchison nor her daughter Janice is aged, blind or disabled, the categories covered under SSI (see, e.g., 42 U.S.C. §1381a), but Janice is a "dependent child" under 42 U.S.C. §606(a)(1), since she is "deprived of parental support by reason of the ... continued absence from the home, or physical ... incapacity of a parent [her father], and ... is living with [her] ... mother ...," and she is also "under the age of eighteen." 42 U.S.C. §606(a)(2)(A). (A-7).

allowances for the medically needy which are at least as great as those provided for actual AFDC recipients similarly situated in terms of family size and shelter costs rather than leaving the medically needy to live on a lower level. Any other result would violate the Social Security Act.

B. The Federal Regulations Implementing the Statute in Conformity with the Legislative History

While the case is governed by 45 C.F.R. §248.3(c)(1)(ii), which has been in effect since January 1, 1974, see 39 Fed. Reg. 9518 (Mar. 11, 1974), all of the case law on the issue deals with an earlier version of the regulation, 45 C.F.R. §248.21(a)(3)(i)(B).* All of the case law supports the decision of the court below, and the changes in the regulations made no substantive change in their meaning. The old regulation, section 248.21(a)(3)(i)(B) provided that the income allowances for maintenance had to be

> as a minimum, at the levels of the most liberal money payment standard used by the State, at any time on or after January 1, 1966, as a measure of financial

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* The old regulation is still in effect in Guam, Puerto Rico, and the Virgin Islands and there is nothing to indicate that the substantive requirements still applied there are any different than those applied in the fifty states. The prior regulation remains in effect in those islands because SSI is not in effect there, and those areas retained their old programs for locally run categorical assistance to the aged, blind and disabled. Thus, because there can be more than two program eligibility limits to compare (e.g. AFDC and OAA, AB, and AD,or AABD), the "most liberal money payment standards" language is still required rather than the comparative language of the new regulation, which is gramatically applicable only to areas with two programs.

> eligibility in any categorical money payment program in the state. ...

That regulation was the subject of judicial construction in several states, and in each and every case of which counsel is aware the court reached a conclusion identical to that reached by the court below about what the regulation required - - namely that the income allowances for the medically needy have to be no lower than the standards of payments for cash public assistance.

In the New York state courts that result was reached in Schlemowitz v. Lavine, 75 Misc. 2d 529 (Sup. Ct. Monroe Co. 1973), where under now repealed provisions of state law, N.Y. Social Services Law §367-a(4) as repealed by Ch. 738, §1 of the Laws of 1974, and an earlier version of 45 C.F.R. §248.21(a)(3)(i)(B), medically needy persons shared the cost of their care by paying 20 percent thereof (75 Misc. 2d at 531-532). The Court there gave a thorough analysis of the "most liberal money payment standard," requirement, and like the court below (A-268-270) the court in Schlemowitz rejected the Commissioner's argument that the actual AFDC standard for a family could not be used because it is not expressed in "total dollar amounts." The court explained that "New York, in its categorical aid programs, does not provide a total dollar amount of aid" but rather a fixed dollar basic allowance plus an allowance for shelter and heat up to a maximum which varies in different areas of the State, so it

had to take account of those variations in its medical assistance program. (75 Misc. 2d at 533).

Likewise the court in Schlemowitz, as did the district court here, rejected the Commissioner's claim that he could use a purported* statewide average of the shelter allowances added to the basic allowance, rather than the actual allowance. As the court put it,

> [W]hat is "average" cannot be the "most liberal." Use of the average rental cost does injustice to those who must pay rentals higher than the average. ... (75 Misc. 2d at 533).

The court concluded that to the extent the actual public assistance level for a family, if the family were otherwise without income, would exceed the levels set forth by N.Y. Social Services Law §366(2)(a)(8), the higher public assistance levels had to be used for their income allowance under medical assistance. (75 Misc. 2d at 553-554).

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* The correctness of these purported averages is dubious. Prior to the increases in the medical assistance income allowances for families of three or more in 1975 (Ch. 480 of the Laws of 1975), those allowances were the same as they were in 1969. Ch. 184, §19 of the Laws of 1969. Meanwhile the basic allowance for public assistance were increased substantially, cf. the levels at Ch. 184, §5 of the Laws of 1969 with the current levels in N.Y. Social Services Law §131-a(3). Likewise, as then Commissioner Lavine put it, "it is unrealistic to believe that 1972 shelter cost data is applicable today" (A-112, 114), and both the rent and fuel allowances have just been increased (A-120, 216). Oddly also the medical assistance allowances for families of four were not increased by Ch. 480, though all other levels were. If the Commissioner's averaging theory should be approved the issue of its correctness will remain to be determined (A-140, 283).

In Dominguez v. Milliken, CCH Medicare & Medicaid Guide ¶26,633 (W.D. Mich. No. G-198-72 C.A. 1973) the court reached a like result. Michigan, like New York, had a public assistance payment standard composed of a fixed basic allowance plus a shelter allowance variable up to a maximum (Id. at 9120).* As the court explained:

> Michigan has the option to protect the integrity of its budget by reducing any or all categorical assistance levels, by declining to participate in the medical assistance program or by choosing not to provide medical assistance to the "medically needy." These options preserve for Michigan the power to allocate its resources as it sees fit. Plaintiffs merely contend that a reasonable reading of the applicable regulation and its statutory antecedent requires that if Michigan does elect to participate in extending medical assistance to the medically needy (the plaintiff class), it must provide that assistance to the working poor in a manner comparable to that applicable to those receiving categorical relief. This court must agree. (Id. at 9121). (Emphasis supplied).

Continuing, the court concluded that the "most liberal money payment" regulation

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* Indeed, it appears that similar to New York's county variations in shelter allowances, Michigan had five (5) different shelter levels in use in different counties. Stipulation of Facts dated Feb. 7, 1973, cited in Brief in Support of Motion for Supplementary Relief and Motion to Cite for Contempt, p.4, Dominguez v. Milliken, supra. Michigan law requires that the income levels for the medically needy "shall recognize regional variations." Mich. Stat. Ann. §16.490(16)(2)(c).

> does not force the defendant to spend a single penney on public assistance than it chooses to spend. It does, however, implement controlling federal statutory policy which ordains that one of the conditions of federal funding of a state medical assistance program for the medically needy is that this class of recipients be treated similarly to - - afforded no lesser amount of protected income than those persons receiving broader categorical assistance as well as medical assistance. (Id.) (Emphasis supplied).

The same can be said for New York, as did the court below.

So also in Hayes v. Stanton, 512 F.2d 133 (7th Cir. 1975), the court explained the eligibility criteria for the medically needy in Indiana thusly:

> [A]ny person who demonstrated the state's standard of financial need and who satisfied the eligibility requirements of categorical assistance, was automatically eligible for Medicaid. Such persons were considered "categorically needy". ... For those whose income was in excess of the state financial standard, thereby precluding automatic eligibility for Medicaid, but who incurred high medical expenses sufficient to meet the state's medical assistance standard, the state could, by providing an optional program for the medically needy, provide them Medicaid coverage if the otherwise ineligible person would spend down his income which was in excess of the state's financial standard of assistance. 42 U.S.C. §1396a(a)(10), (a)(17). (Id. at 137 n.5) (emphasis supplied).

The only court of appeals to consider the income eligibility standards for the medically needy thus reached the same con-

clusion as did the court below -- they must at least meet the state's cash assistance standards.

In Wong v. Brian, CCH Medicare & Medicaid Guide ¶26,605 (Trfr. Binder)(Cal. Ct. App. No. 3 Civ. 13328 1972), the court reached the same conclusion about the meaning of the "most liberal" language of 45 C.F.R. §248.21 applicable to resources (currently §248.21(a)(3)(i)(D)). It held that the resource levels for the medically needy had to be no less liberal than the most liberal standards of any of the categorical cash public assistance programs (the medically needy were allowed to retain $1200 of resources while those receiving Aid to the Blind could retain $1500 of resources).*

The same conclusion was reached in Schaak v. Schmidt, 344 F.Supp. 99 (E.D. Wisc. 1971), where a three-judge court concluded that state regulations limiting a medically needy person to ownership of a home worth no more than $7500 was contrary to

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* In Wong the state was also ordered to increase its income allowances to 133 1/3% of the federal participation level for AFDC (see current regulation at 45 C.F.R. §§248.21(a)(3)(i)(B) and 248.21(c)(3)). The 133 1/3% level was an alternative applicable where the AFDC levels were less than the income levels under other categorical assistance programs, cf. Jefferson v. Hackney, 406 U.S. 535, 537 (1972). Thus where the AFDC levels were less than 75% of other categorical assistance levels the state could use as an alternative medical assistance standard 133 1/3% of its AFDC standard. In New York the 133 1/3% alternative was never applicable since AFDC levels were never less than 90% of other categorical assistance levels, see Ch. 133, §1 of the Laws of 1971, and were raised to parity with the other program levels in 1973. Ch. 150 of the Laws of 1973.

federal regulations* since there was no statutory maximum on the value of a home under categorical cash public assistance programs. The Court stated that under those circumstances

> the medically needy are subjected ... to a resource limitation less liberal than those in the other state money payment programs. The regulation is obviously violated. ... (Id. at 103).

See also Wilczynski v. Harder, 323 F.Supp. 509 (D. Conn. 1971) where a three-judge court construed the reasonability of asset limitations under Connecticut's medical assistance program upon a stipulation that "the most liberal level used in any money payment program" under then regulation 248.21(a)(1)(iv) meant the limitation then in effect under several of the state's categorical assistance programs (Id. at 517).

Effective January 1, 1974, the "most liberal money payment standard" regulations have been superseded by 45 C.F.R. §248.3(c)(1)(ii). That regulation is slightly different in wording than the old regulation, but, as the court below held (A-272-273), its effect is the same. Section 248.3(c)(1)(ii) requires that the income levels for maintenance be set "as a minimum, at the higher of the levels of the payment standards generally used as a measure

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* Then section 248.21(a)(1)(iv) of Title 45 of the Code of Federal Regulations was substantially the same as current regulation 248.21(a)(3)(i)(B).

of financial eligibility in the money payment programs," namely for families of three or more the AFDC level (§248.3 (c)(1)(ii)(A)) and for families of one or two, the higher of the AFDC or SSI levels (§248.3(c)(1)(ii)(B)). The defendant Commissioner contends that under this language he may use a purported average AFDC payment standard rather than the actual, higher AFDC payment standard applicable to certain medically needy recipients in counties like Rockland County where shelter costs, and accordingly AFDC shelter allowances, are high.

There was no substantive change intended when regulation 248.3 replaced regulation 248.21. The new regulation was proposed simply to deal with the changeover from state administered programs for the aged, blind and disabled to the federal SSI program. 38 Fed. Reg. 32216 (Nov. 21, 1973). As initially proposed the regulation stated:

> The income levels for maintenance must be, at a minimum, at the level of <u>the payment standard used as a measure of financial eligibility in the appropriate money payment program</u>, that is (A) in the case of families with dependent children, at the level of the payment standard of the State plan approved under Title IV-A [AFDC]; (B) In the case of aged, blind, and disabled individuals, at least the highest level of payment which is available to individuals in the three groups. ...

38 Fed. Reg. 32219 (Nov. 21, 1973)(Emphasis supplied).

For the Aitchisons, of course, the payment standard for determining financial eligibility for AFDC is $370 per month, not the lower medical assistance level of $317 per month.

The U.S. Department of Health, Education and Welfare received comments pointing out that under that proposed version it seemed that families with children were to have a different standard applied to them than SSI-related families. That, of course, would have violated the requirements of 42 U.S.C. §§1396a(a)(10)(C)(i) and 1396a(a)(17) that standards be "comparable" or "comparable for all groups," so the regulation in its final version was changed to eliminate the

> implication of the regulations that separate standards for medically needy, aged,blind and disabled persons and for families with children would be established. The regulations were revised to indicate clearly that this was not the intent, and that the level of the higher payment standard generally available would govern.

39 Fed. Reg. 9512 (Mar. 11, 1974).

HEW further explained that it was "tying [the maintenance level] to the higher payment standard generally available in the money payment programs." 39 Fed. Reg. 9513 (Mar. 11, 1974).

Accordingly, the original reference in section 248.3 (c)(1)(ii) to the payment standard "in the appropriate money payment program" was changed to "the higher of the levels of the payment standards generally used." The standards "generally used" are either the AFDC or the SSI standards; they are not some pur-

ported AFDC standard never used at all. (A-271). So also the AFDC payment standard "generally applied" (§248.3(c)(1)(ii)(A)) does not authorize averaging on the theory that since New York has no fixed AFDC standard only a purported average is "generally applied," but merely permits, as the court below noted (A-272), the state to use the general AFDC eligibility limits without regard to special rent exceptions available in some areas (A-91),* see also N.Y. Social Services Law §131-a(6); 18 N.Y.C.R.R. §352.1(c), or exceptions to the SSI levels for persons who were receiving AABD at a higher level and were "grandfathered in" at that higher payment level. P.L. 93-66, §§212(a)(2) & (a)(3)(A).

The reading given the federal regulations by the court below comports fully with the very definition of the "medically needy" set out elsewhere in the regulations: they are defined as persons with income and resources which "exceed the amount ... allowed to the categorically needy," but whose income or resources are insufficient to meet their medical expenses. 45 C.F.R. §248.1(a)(2)(i). The amount allowed to a two person categorically needy AFDC family in Rockland County

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* These exceptions are in the process of being phased out in conjunction with the higher rent schedules promulgated by the Commissioner, N.Y. State Department of Social Services Administrative Letter 75 ADM-98, Sep. 12, 1975.

paying the same rent as the Aitchisons is $370 per month and so the medically needy are those whose income falls below that $370 figure, after deducting medical expenses as required. 45 C.F.R. §248.1(a)(2)(ii).

The fact that New York's state plan for medical assistance was approved by HEW does not certify that the income levels therein comply with federal law and regulations.* As the court below pointed out (A-273), the state plan contains nothing more than the table of income allowances without any showing of how they were calculated; indeed it appears that the plan consists merely of the state checking a box certifying its own compliance with the relevant regulation (A-103, 109). Cf. Rosado v. Wyman, 397 U.S. 397, 406 (1970); Almenares v. Wyman, 453 F.2d 1075, 1087 (2d Cir. 1971), cert. denied 405 U.S. 544 (1972). Indeed,

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* HEW has in fact advised New York that its income allowances for the medically needy violate federal requirements since "the cash assistance standards have become more liberal than the MA standards for most family sizes" (A-38) (Emphasis supplied). Plainly this could not mean, as the Commissioner argues, that New York's allowances were inadequate only for one and two person families; if only two family sizes were at issue there is no number which represents "most" such family sizes - - two is "all" and one is "half" (certainly not "most"). While the regulatory reference in the HEW letter is to 45 C.F.R. §248.3(c)(1)(ii)(B), pertaining to SSI or AFDC families of one or two, the statutory reference in that nonconformity letter is to 42 U.S.C. §1396b (f)(1)(B)(i), which refers to AFDC levels only, and without limitation to family size.

even the State itself has recognized that its income allowances for the medically needy are illegal. In the Governor's Task Force Report on Human Services (1975) at 33, the Report noted

> Some families (notably two person families) receive more in public assistance than their medical assistance ceiling. This puts New York State out of compliance with the requirement in Federal law that all public assistance persons must be eligible for medical assistance.

(Copy annexed as Exhibit B to affidavit of Douglas J. Good, Esq., dated December 17, 1975, in opposition to motion for stay in this Court). Since families receiving public assistance are by definition categorically eligible for medical assistance, 45 C.F.R. §248.1(a)(1)(i), the Report plainly refers to the medically needy and recognizes that their income allowances are illegally low.

The holding of the district court that New York's medical assistance income allowances violate 45 C.F.R. §248.3(c)(1)(ii) is supported by the history of the federal regulations covering this area, the language of those and related regulations, and all of the case law on the subject. Plainly the decision below was correct.

C. The Commissioner's "Total Dollar Payments" Argument and Analysis of Flat Grants under the AFDC Program are Inapposite

The major thrust of the defendant Commissioner's argument on appeal is that the judgment below violates the requirement

of federal regulations that income allowances for the medically needy be expressed in "total dollar amounts" 45 C.F.R. §248.3(c)(1)(ii). From that the Commissioner further concludes that since he could allegedly average shelter costs under federal law to arrive at a total "flat grant" AFDC payment level, although he has in fact not done so,* he can do to the medically needy that which he has been unable or unwilling to do to those on categorical assistance.

The Commissioner argues at some length that the ruling of the court below violates the "total dollar amounts" provision of regulation 248.3(c)(1)(ii). The fact is that the Commissioner has set up a straw man; the system he claims is required by the judgment below is, as the court below put it in another context, "scarcely inevitable." (A-269). The judgment below merely prohibits the Commissioner from establishing income allowances for

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* Under current state law the Commissioner is obligated to administratively set rent and fuel allowances at adequate levels, Ciulla v. Lavine, 79 Misc. 2d 297 (Sup. Ct. Monroe Co. 1974); N.Y. Social Services Law §131-a, so a flat grant system such as that discussed by the Commissioner is not legal under state law. Indeed, prior litigation against the Commissioner has made it clear that shelter costs are the variable in the needs of public assistance recipients across the state. See Rothstein v. Wyman, 303 F.Supp. 339, 342 (S.D.N.Y. 1969), vacated on other grounds, 398 U.S. 275 (1970). The scope of the disparity in "adequate" rent levels is vast; e.g. for a family of three they range from a low of $111 per month in Chautauqua County to $277 per month in Suffolk County (A-210-211). It is thus possible that, in New York, "any averaging process with respect to shelter allowances is invalid." Johnson v. White, Dkt. no. 75-7153 (2d Cir. Nov. 28, 1975) Slip. opn. at 782.

the medically needy which result in their being allowed to retain less monthly exempt income than the AFDC standard of need* for that size family in the same county with the same shelter costs. Absent any legislative response, New York would have to make individualized calculations based on such persons' shelter costs. However, New York could enact a new table of increased allowances under N.Y. Social Services Law §366(2)(a)(8) and 18 N.Y.C.R.R. §§360.5(e) and 360.7(a)(5) which would conform with the judgment below, simply by setting the levels therein at the highest level of AFDC payments anywhere in the state at each family size. If that option be fiscally unpalatable, then New York could split its schedule between urban and rural areas, since 42 U.S.C. §1396a(a)(17) expressly authorizes such variations "based on the variations between shelter costs in urban areas and in rural areas." See State Plan Form (A-109). The Commissioner was not required by the court below to establish a system based

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* As the court below correctly recognized, the "standard of need" and the AFDC "payment standard" in New York are identical (A-282). N.Y. Social Services Law §§131-a(2) & (3). Thus the Commissioner's point that the "payment standard" differs from the "standard of need" is specious. Likewise the contention that the use of the phrase "payment standard" in the singular, rather than the plural number, in 45 C.F.R. §248.3(c)(1)(ii) prohibits a standard like that used in New York AFDC programs, which varies, is belied by the relevant AFDC regulation, 45 C.F.R. §233.20(a)(2)(i) which requires a "statewide standard" of both "need" (§233.20(a)(2)(i)(a)) and "amount of assistance payment" (§233.20(a)(2)(i)(b)). Both the AFDC standards of "need" and "amount of assistance payment" vary, and thus, by the Commissioner's own logic, could not be lawful as a "standard" either.

on variable shelter costs, and he has several simple alternatives to such a system. The fact that he may not want to adopt those simple alternatives is no ground for justifying further violations of federal requirements.

The fact is also that the very same "total dollar amounts" language was contained in the predecessor regulation, section 248.21(a)(3)(i), and that same argument by the Commissioner was rejected by the state courts. Schlemowitz v. Lavine, 75 Misc. 2d 529, 533 (Sup. Ct. Monroe Co. 1973). There the court concluded that since the categorical assistance programs in New York do not use "total dollar amounts," but rather vary up to a maximum, so must the allowances for the medically needy. That comports fully with the decision below (A-270) that this regulation does nothing more than the like regulation governing AFDC, which requires that eligibility be based on a "statewide standard, expressed in money amounts" (A-283). 45 C.F.R. §233.20(a)(2). So also 45 C.F.R. §233.20(a)(2)(iii) requires that the AFDC "standard will be applied uniformly throughout the State." If New York's AFDC standard is considered to be "uniform" notwithstanding its variable shelter allowances determined on a county basis, there is plainly no logical reason why a similar medical assistance standard is not also "uniform," Cf. 39 Fed. Reg. 9513 (Mar. 11, 1974). Indeed, as the court below pointed out (A-283),in Michigan where the medical assistance income levels were held illegal in Dominguez v. Milliken, supra, since they were below the AFDC income stan-

dards, the state uses a formula to express its eligibility levels, based on heating zone and shelter area. 2 CCH Medicare & Medicaid Guide ¶15,600 at 6558.*

The Commissioner's argument about how he could use an averaging system under AFDC is simply irrelevant, for the fact is that he has not done so,** and he is trying to compare the medical assistance income levels with AFDC levels which concededly are not in effect.

D. The Federal Regulations as Construed by the Court Below Conform to the Requirements of the Statutory Predicates.

As has been demonstrated, see Point A, supra, the statutory predicates for the federal regulations are in complete conformity with the judgment below; indeed, it is the Commissioner's reading of the regulations which is incompatible with the statutes and their legislative history. Moreover, the Commissioner's argument that the judgment below violates the controlling statutes ignores the fact, as pointed out in Point C, supra, that the judgment below in no way mandates the variable system attacked by the Commissioner. Complete conformity with the judgment below could be achieved by enacting new monetary figures under N.Y. Social Services Law §366(2)(a)(8) at a

* Mich. Stat. Ann. §16.490(16)(2)(c) requires that "These levels shall recognize regional variations."

** Whether New York could do so in the face of its greatly disparate shelter costs is debatable. See fn. p. 18, supra.

higher, lawful level. The fact is also that, as the Court below recognized (A-275), the same argument advanced by the Commissioner has been rejected in every other case where it appears to have been raised. Dominguez v. Milliken, CCH Medicare & Medicaid Guide ¶26,633 at 9121 (W.D. Mich. No. G-198-72 C.A. 1973); Schaak v. Schmidt, 344 F.Supp. 99, 103-104 (E.D. Wisc. 1971).

As for the contention that the judgment below violates 42 U.S.C. §1396a(a)(10) by making the assistance available to the medically needy and to the categorically needy "equal" because it requires that the income allowances for the medically needy at least be "equal" to those for the categorically needy, the Commissioner misconstrues the law. The portions of section 1396a(a)(10) cited by the Commissioner have nothing whatsoever to do with income levels for medical assistance, but rather require that the medical services covered must be "equal in amount, duration, and scope,"* within the respective categories of the medically and categorically needy. See Raner v. Edelman, 365 F.Supp. 504, 506 (N.D. Ill. 1973)(under prior version of statute); 1 U.S. Code Cong. & Admin. News 2017 (1965). [42 U.S.C. §1396a(a)(10)(C)(ii)]. Cf. Boisvert v. Zeiller, 334 F.Supp. 403, 408 (D. N.H. 1971) [42 U.S.C. §1396a(a)(10)(B)(i)]. It also provides that the categorically needy may not receive

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* How income eligibility levels could have duration or scope is not explained by the Commissioner.

medical assistance services which are "less in amount, duration or scope" than those provided to the medically needy. [42 U.S.C. §1396a(a)(10)(B)(ii)]. See Fullington v. Shea, 320 F.Supp. 500, 505 (D. Colo. 1970), aff'd 404 U.S. 963 (1971). The sections relied on by the Commissioner concern equality of services, not equality of income levels. The requirements for equal income levels are contained elsewhere in section 1396a (a)(10), the provisions ignored by the Commissioner. See p.3, supra.

The erroneous readings of these sections of the law by the Commissioner are symptomatic of his difficulties in this case. It is quite clear that the federal regulations, as construed below, fully comport with the law - and that New York State must change its practices to conform with those regulations and the Social Security Act.

POINT II

THE DISTRICT COURT HAD JURISDICTION TO DETERMINE THIS CASE.

A. Plaintiffs-Appellees' Equal Protection Claims Raise Substantial Constitutional Questions Establishing Jurisdiction Under 28 U.S.C. §1343(3).

The Aitchisons have alleged that New York Social Services Law §366(2)(a)(8) and its implementing regulations deprive them and other "medically needy" Medicaid recipients of the equal protection of the laws by compelling them to subsist at a level considerably below the already low public assistance level at which "categorically needy" Medicaid recipients live. (A-12). The District Court found the Aitchisons' equal protection claim not "wholly insubstantial" or "obviously frivolous" and therefore sufficient* to invoke its jurisdiction under 28 U.S.C. §1343(3).**

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* Once a federal court has ascertained that a plaintiff's jurisdiction conferring claims are not insubstantial on their face, no further consideration of the merits of the claims is relevant to a determination of the court's jurisdiction over the subject matter. Hagans v. Lavine, 415 U.S. 528, 542 n.10 (1974).

** Even if there were not any equal protection question of constitutional dimensions, the Aitchisons contend that the district court's jurisdiction was proper under 28 U.S.C. §1343(3) and (4) under the analyses set forth in Blue v. Craig, 505 F.2d 830 (4th Cir. 1975). These arguments are not further argued herein, as one panel of this Circuit has ruled to the contrary. Andrews v. Maher, 525 F.2d 113 (2d Cir. 1975). There have on occasion been conflicts between panels. Compare Aguayo v. Richardson, 473 F.2d 1090, 1102 (2d Cir. 1973), cert. denied sub nom. Aguayo v. Weinberger, 414 U.S. 1146 (1974), with Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97, 102 (2d Cir. 1970) cert. denied 400 U.S. 949 (1970).

(A-264). The court below properly did not convene a three-judge court to determine this constitutional issue, instead determining the case based upon the inconsistency of New York state law with the controlling federal regulation. Hagans v. Lavine, supra at 543.

The Aitchisons' first equal protection theory - - that they and other medically needy Medicaid recipients are unconstitutionally compelled by state law* to subsist at an income level lower than the public assistance level at which categorically needy Medicaid recipients are allowed to live, raises a substantial equal protection issue. Similar disparities of treatment between classes of Medicaid recipients have been found sufficiently "substantial" to require the convening of a three-judge court [Wilczynski v. Harder, 323 F.Supp. 509 (D. Conn. 1971)] and to sustain the jurisdiction of a three-judge court. [Schaak v. Schmidt, 344 F.Supp. 99, 102 n.4 (E.D. Wisc. 1971)]. In Heucker v. Clifton, 500 S.W. 2d 398, 404 (Ky. 1973) the disparate treatment of certain deductions with respect to different classes of Medicaid recipients was held, on the merits, violative of the Equal Protection Clause of the federal Constitution.

The Aitchisons' equal protection theory based on the disparity between the maintenance levels of medically needy and categorically needy Medicaid recipients, is rendered no less

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* New York Social Services Law §366(2)(a)(8) and its implementing regulations.

substantial by the Supreme Court's summary * affirmance in Fullington v. Shea, 320 F.Supp. 500 (D. Colo. 1970), aff'd mem. 404 U.S. 963 (1971), in which equal protection claims were rejected, after a substantial constitutional question was found, under a wholly different set of circumstances, and on the basis of 'rational bases' which are inapplicable here.

In Fullington, Colorado, unlike New York, had not elected to provide medical assistance for the medically needy as well as the categorically needy. The court there considered only two questions: first, whether the federal statutory scheme was violated by failing to include the medically needy; and second, "whether the failure ... to extend Medicaid to the 'medically indigent' while at the same time extending it to the 'categorical' recipients [violates the Equal Protection Clause]." (Id. at 503). The first question, concerning whether federal law requires coverage for the medically needy, is irrelevant to this case, since New York has elected to provide such coverage. The second question, the constitutionality of totally excluding the medically needy is also different from the equal protection

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* Summary affirmances or dismissals, while controlling, are

> .... "somewhat opaque" Gibson v. Berryhill, 411 U.S. 564, 576 (1973), and must in each case be analyzed carefully in order to discover what issues were actually before the court. ...

See Mercado v. Rockefeller, 502 F.2d 666, 673 (2d Cir. 1974), cert. denied sub nom. Mercado v. Carey, 420 U.S. 925 (1975).

questions here: i.e. whether, having chosen to provide Medicaid coverage to the medically needy, New York can require some, but not all, persons related to that category to live below the public assistance level; and whether New York can require any such persons to live at below the public assistance level when other (categorically needy) Medicaid recipients need not.

That the ultimate issues are, in fact, different is clear also from an examination of the rationales advanced for the scheme challenged in Fullington. There the state defended its policies on the grounds that undertaking to cover the medically needy "could conceivably create much administrative difficulty and uncertainty" and that such a program would be expensive. (Id. at 506). Since New York has opted to provide Medicaid coverage for the medically needy the administrative convenience argument is obviously inapposite, and New York has also elected to incur the costs required for providing such coverage. Indeed, the only ground asserted by the Commissioner to counter this equal protection claim is that the state's disparate income allowance levels are "rational" because the resource allowances* under

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* The Commissioner cites no legal authority whatsoever in support of his bold additional assertion that the medically needy Medicaid recipient may retain "... more exempt income... than the public assistance recipient..." (Brief for Commissioner at 31). The Commissioner must recognize that this is under no circumstance the case for any of the members of plaintiffs-appellees' class. In fact, the practice of the Commissioner has actually been to allow even fewer income disregards for medically needy than for categorically needy Medicaid recipients. See, e.g., Dumbleton v. Reed, 49 A.D. 2d 687 (4th Dept. 1975) (appeal pending).

medical assistance are more favorable for the medically needy than for the categorically needy, a justification never touched on by the district court in Fullington, and consequently not even arguably* decided by the Supreme Court. Fullington is a different case from this and does not foreclose the equal protection claims asserted here.**

The Aitchison's second equal protection theory -- that New York has unconstitutionally required some, but not all, medically needy Medicaid recipients to live below the applicable public assistance level, based on geographical*** factors entirely unrelated to the Medicaid program -- is also substantial. Suffice it to say that geographical disparities**** in social welfare

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* See fn. ** p. 26, supra.

** See pp. 30-31 infra. The Commissioner asserts, apparently with little conviction, that the so-called "prior decision" test of substantiality is "arguably" applicable in this case. (Brief for Commissioner at 28).

*** As the record indicates, in 15 [including New York City's 5] counties, all medically needy Medicaid recipients are forced to subsist at an income level below the maximum public assistance level. In 28 other counties some, but not all, medically needy Medicaid recipients must subsist in that fashion. In the remaining 19 counties, all the medically needy subsist at a level exceeding the public assistance level. (Supplemental Affidavit of Rene H. Reixach, ¶7 [A-217]).

**** In addition to these geographical disparities, further disparities exist based on such factors as family size, whether the recipient's rent payment includes heat, and, if not, in two counties only (A-217) whether gas or oil heat is used. In 28 counties, some, but not all, medically needy Medicaid recipients must subsist at an income level below the maximum public assistance level. (A-217). (fn. cont'd on next page).

programs have frequently been of sufficient constitutional dimensions to require the convening of a three-judge court under 28 U.S.C. §2281, under which the test of substantiality is at least as strict as that under 28 U.S.C. §1343(3). See, e.g. Rosado v. Wyman, supra p.iii 30[illegible] F.Supp. at 1350; Rothstein v. Wyman, 303 F.Supp. 339 (S.D.N.Y. 1969), vacated for determination of statutory claims first, 398 U.S. 275 (1970). See also Raner v. Edelman, 365 F.Supp. 504, 506 (N.D. Ill. 1973). In Maggett v. Norton, 519 F.2d 599, 602 (2d Cir. 1975), this Circuit reiterated that "'claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous ...' [citation omitted]" and further noted that constitutional claims have been dismissed by single judges under this standard only in very limited circumstances.

Whether or not* the so-called "prior decisions" and "obviously frivolous" test of substantiality of a constitutional claim are in fact distinguishable, it is palpably clear that the

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(fn. **** cont'd from page 28)
In each of these 28 counties, medically needy families of certain sizes (which are not even consistent from one county to the next) can live below the applicable public assistance level. See tables at A-150-207, A-215-217. For example, in Broome County, medically needy families of one member or 3 or more members can live below the applicable public assistance level, while in adjoining Chenango County for no divinable reason, only medically needy families of 5 persons (but not any other size) can live below the applicable public assistance level. (A-167). Even were it appropriate to determine whether such distinctions were "rational," to sustain jurisdiction, which it is not (see pp. 30 to 31, infra), these distinctions could not be so viewed.

* See Goosby v. Osser, 409 U.S. 512, 518 (1973); Cordova v. Reed, 521 F.2d 621 (2d Cir. 1975); Rosenthal v. Board of Education, 497 F.2d 726, 729-30 (2d Cir. 1974).

Aitchisons' equal protection claims are neither foreclosed* by prior decisions of the Supreme Court nor obviously frivolous.**

The Commissioner's challenge to the District Court's exercise of jurisdiction relied upon Dandridge v. Williams, 397 U.S. 471 (1970) for the same proposition he unsuccessfully advanced before the Supreme Court in Hagans. It should be clear from Hagans that, while Dandridge presents the standard

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* "... [P]revious decisions which merely render claims of doubtful or questionable merit do not render them [constitutionally] insubstantial ..." Goosby v. Osser, supra, at 518 (1973) (convening of a three-judge court). Thus, for example, even where the Supreme Court had dismissed an almost identical case for want of a substantial federal question, the lack of an exact factual identity coupled with the non-identity of the state statutes under constitutional attack has supported a finding of "substantiality." Wager v. Lind, 389 F.Supp. 213, 216 (S.D.N.Y. 1975)(requiring convening of three-judge court).

** The substantial constitutional question test or tests have been characterized as tests of whether claims are "'so attenuated and insubstantial as to be absolutely devoid of merit,' [citation omitted]; 'wholly insubstantial;' [citation omitted]; 'obviously frivolous,' [citation omitted]; 'plainly insubstantial,' [citation omitted]; or 'no longer open to discussion.'" Hagans v. Lavine, supra at 536-37. Further, as the Hagans Court reiterated at 537, the limiting words used above have "'cogent legal significance.'" Only the "obviously" frivolous claim - - not the merely doubtful nor even the questionable one - - may be treated as insubstantial. See Hagans v. Lavine, supra at 538, quoting Goosby v. Osser, supra at 518. See also Edelman v. Jordan, 415 U.S. 651, 653 n.1 (1974) (citing Hagans).

against which most social welfare Equal Protection Clause claims must be measured, when they are reached, "... Dandridge evinced no intention to suspend the operation [emphasis added] of the Equal Protection Clause in the field of social welfare law ..." Hagans v. Lavine, supra, at 539. Any notion that the constitutional substantiality of an equal protection claim might be resolved according to whether the classification, upon analysis, proves "rational" under Dandridge, was laid to rest in Hagans. The preliminary jurisdictional inquiry permitted under Hagans is far less extravagant: questions of substantiality must be resolved in favor of jurisdiction unless the challenged classification is, on the face of the complaint, "... so patently rational as to require no meaningful consideration." Hagans v. Lavine, supra, at 541 (emphasis added).* While Dandridge mere "rationality" analysis might ultimately defeat an equal protection claim, it is not the test of whether that claim may be asserted in a federal forum. See Wilczynski v. Harder, supra at 519 (D. Conn. 1971); Schaak v. Schmidt, supra at 102 (three-judge court cases concerning Medicaid, citing Dandridge, and finding jurisdiction nonetheless).

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* ... Whether the complaint states a cause of action on which relief could be granted is a question of law and ... must be decided after and not before the court has assumed jurisdiction over the controversy.

Bell v. Hood, 327 U.S. 678, 682 (1946), quoted in Hagans v. Lavine, supra at 542.

B. The Amount in Controversy Clearly Exceeds $10,000, Exclusive of Interests and Costs, Establishing Jurisdiction Under 28 U.S.C. §1331(a).

Also sustaining the district court's exercise of jurisdiction is 28 U.S.C. §1331(a). Plainly, plaintiffs-appellees' causes of action arise under the Constitution and laws of the United States. See Gully v. First National Bank, 299 U.S. 109 (1936).

Only open to consideration, then, with respect to §1331 jurisdiction, is the existence of the requisite amount in controversy. As this Circuit only recently noted, courts should dismiss only when it is clear "to a legal certainty" that the jurisdictional amount cannot be met; all that is required to sustain jurisdiction is that there be a "reasonable probability," using "some realistic formula," that the amount in controversy exceeds the jurisdictional amount. Moore v. Betit, 511 F.2d 1004, 1006 (2d Cir. 1975). The jurisdictional amount requirement, as this Court has noted, is normally met by a good faith allegation of the plaintiff. If the defendant challenges the amount alleged, the plaintiff must demonstrate the amount involved. Id. at 1007. That the "amount in controversy" here exceeds $10,000, however, is clear.

In Bass v. Rockefeller, 331 F.Supp. 945 (S.D.N.Y. 1971), vacated as moot 464 F.2d 1300 (2d Cir. 1971), another case involving the medically needy, Judge Tenny held that the state

occupied the position of a "... trustee holding state and federal monies for the benefit of the medically needy ..." (Id. at 951); the amount in controversy accordingly was the amount of such monies at stake in the action, conceded to be in excess of $10,000. See also Bass v. Richardson (Bass II), 338 F.Supp. 478 (S.D.N.Y. 1971).

In the instant case, both defendants have conceded that the Commissioner is responsible for the administration of a medical assistance budget exceeding 3 billion dollars annually (1/2 federal; 1/4 state; 1/4 local) (A-139), of which over 300 million dollars is for the medically needy, and have further conceded that the monies allegedly underpaid each year to the members of the Aitchison's class range in the millions of dollars. (Complaint, ¶24 [A-11-12]; Lavine Answer, ¶6 [A-17]; Weinberg answer, ¶3 [A-20]). Also, defendants both stipulated that if plaintiffs were to prevail, "... the financial impact on the state medical assistance budget [would] be in excess of $10,000." (A-139). Therefore, the requisite jurisdictional amount is also in controversy from the "defendants' viewpoint." See, e.g. Yanez v. Jones, 361 F.Supp. 701, 706 (D. Utah 1973), cited in Moore v. Betit, supra at 1007, n.12 (citing cases). So also in National Welfare Rights Organization v. Weinberger, 377 F.Supp. 861, 866 (D.D.C. 1974), it was held that the jurisdictional amount could be found in the cost to the defendant of enforcing the right asserted by the plaintiff. In fact the amount in controversy

will exceed $10,000 no matter who is the plaintiff. A judgment invalidating the current income allowances even as to one plaintiff should be expected to be applied to all persons similarly situated since the defendants are government officials rather than private parties. See Almenares v. Wyman, supra, 453 F 2d at 1085.

There is consequently no need for the type of remand - - for further consideration of the amount in controversy under Bass - - made in Moore. Further, though this Circuit has reserved decision on the validity of the Bass approach outside the class action context [Moore v. Betit, supra at 1007], the instant case was certified as a class action by the district judge, and the propriety of that certification has not been so much as questioned on this appeal.

Moreover, this case, like most cases in which the Bass analysis has been used [see cases cited in Moore v. Betit, supra at 1007 n.12], involves the interpretation of a federal statute and the validity of nationally applicable federal regulations, and concerns a welfare program relying heavily on federal funds. Cf. Almenares v. Wyman, supra, 453 F.2d at 1085. This Circuit has acknowledged that such claims "should rightly be heard in a federal forum." Id.

CONCLUSION

For the foregoing reasons the court below correctly determined that the income allowances in N.Y. Social Services Law §366(2)(a)(8) and 18 N.Y.C.R.R. §§360.5(e) and 360.7(a)(5) violate 45 C.F.R. §248.3(c)(1)(ii) insofar as they allow the medically needy to retain less monthly exempt income than New York allows a family of the same size under AFDC with the same shelter costs (including heating fuel where applicable) living in the same social services district; that 45 C.F.R. §248.3 (c)(1)(ii) is consistent with 42 U.S.C. §§1396a(a)(10) and 1396a(a)(17); and that the court had jurisdiction to determine the case. Accordingly the judgment below should be affirmed.

Dated: January 27, 1976

Respectfully submitted,

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APPENDIX OF

STATUTES AND REGULATIONS

FEDERAL STATUTES

Section 1396a of Title 42 of the United States Code states in part:

§ 1396a. State plans for medical assistance—Contents

(a) A State plan for medical assistance must—

* * *

(10) provide—

(A) for making medical assistance available to all individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter;

(B) that the medical assistance made available to any individual described in clause (A)—

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in clause A; and

(C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—

(i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and

(ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration, and scope;

* * *

* * *

(17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV, or to have paid with respect to him supplemental security income benefits under subchapter XVI of this chapter as would not be disregarded (or set aside for future needs) in determining his eligibility for such aid, assistance, or benefits,

* * *

FEDERAL REGULATIONS

Section 248.3 of Title 45 of the Code of Federal Regulations, effective January 1, 1974, states in part:

§ 248.3 State plan requirements on financial eligibility for medical assistance programs.

* * *

(c) With respect to the medically needy, the State plan must:

(1) Provide levels of income and resources for maintenance, in total dollar amounts, as a basis for establishing financial eligibility for medical assistance. Under this requirement:

(i) Such income levels must be comparable as among individuals and families of varying sizes;

(ii) Except as specified in paragraph (c)(1)(iii) of this section, the income levels for maintenance must be, as a minimum, at the higher of the levels of the payment standards generally used as a measure of financial eligibility in the money payment programs, that is:

(A) In the case of families of three or more, at the level of the payment standard of the State plan approved under title IV-A generally applied;

(B) In the case of individuals, or families (including families with children) of two persons, at the higher of:

(*1*) The payment standard of the State plan approved under title IV-A generally applied, or

(*2*) The highest level of payment which is generally available to individuals in any of the three groups (aged, blind and disabled) who are (or would be, except for income) eligible for benefits under title XIX;

* * *

Section 248.21 of Title 45 of The Code of Federal Regulations, superseded by 45 C.F.R. §248.3 effective January 1, 1974 (but still in effect in Guam, Puerto Rico and the Virgin Islands), states in part:

> **§ 248.21 Financial eligibility—medical assistance programs.**
>
> (a) *State plan requirements.* A State plan under title XIX of the Social Security Act must:
>
> * * *
>
> (3) With respect to the medically needy, if they are included in the plan:
> (i) Provide levels of income and resources for maintenance, in total dollar amounts, as a basis for establishing financial eligibility for medical assistance. Under this requirement:
> (A) Such income levels must be comparable as among individuals and families of varying sizes;
> (B) The income levels for maintenance must be, as a minimum, at the levels of the most liberal money payment standard used by the State, at any time on or after January 1, 1966, as a measure of financial eligibility in any categorical money payment program in the State, or at the level for which Federal financial participation is available pursuant to paragraph (c) of this section, whichever is less.
>
> * * *

STATE STATUTES

New York Social Services Law §366, as amended by chapters 480 of the Laws of 1975, states in part:

§ 366. Eligibility

* * *

2. (a) The following income and resources shall be exempt and shall neither be taken into consideration nor required to be applied toward the payment or part payment of the cost of medical care and services available under this title;

* * *

(8) (i) Income in an amount set forth in the following schedules:

Annual net income—Number of family members in a household and family members for whom they are legally responsible or have assumed responsibility

One	Two	Three	Four	Five	Six	Seven
$2,700	$3,800	$4,000	$5,000	$5,700	$6,400	$7,200

Such income exemption shall be increased by six hundred dollars for each member of a family household in excess of seven.

(ii) on and after October first, nineteen hundred seventy-five, income in an amount set forth in the following schedule:

Annual net income—Number of family members in a household and family members for whom they are legally responsible or have assumed responsibility.

One	Two	Three	Four	Five	Six	Seven
$2,700	$3,800	$4,200	$5,000	$5,800	$6,500	$7,400

Such income exemptions shall be increased by seven hundred dollars for each member of a family household in excess of seven.

* * *

STATE REGULATIONS

Section 360.5 of Title 18 of the Official Compilation of Codes, Rules and Regulations of the State of New York, as promulgated on October 31, 1975, states in part:

360.5 Determination of net available income and utilization of any excess.

* * *

(e) If an applicant or recipient is receiving chronic care in a medical institution or intermediate care facility, all resources in excess of those exempt from consideration in accordance with paragraph (a) of subdivision 2 of section 366 of the Social Services Law and $28.50 per month for personal expenses shall be utilized to meet the cost of medical assistance for that applicant or recipient and for maintenance needs of the dependent members of his former family household. For the purpose of this subdivision and subparagraph (8) of paragraph (a) of subdivision 2 of section 366 of the Social Services Law, when a person is in chronic care, he shall not be deemed to be a member of any household except, that for the purpose of determining the amount of the savings exemption for his former family household, he shall be considered a member thereof. All non-exempt income of such an applicant or recipient shall be utilized in the following order:

(1) to meet the maintenance needs of the dependent members of his former family household, less any amount of income in cash or in kind possessed by such dependent members in accordance with the following schedule:

SCHEDULE MA-2

Number of Family Members in Household Dependent on Income

One	*Two*	*Three*	*Four*	*Five*	*Six*	*Seven*
$2,700*	$3,800*	$4,200**	$5,000	$5,800**	$6,500**	$7,400**

For each additional person in excess of seven in the household, add $700.**

*effective July 1, 1975
**effective October 1, 1975

(2) the balance, if any, to meet the cost of his medical assistance.

* * *

Section 360.7 of Title 18 of the Official Compilation of Codes, Rules and Regulations of The State of New York [currently under revision to conform with New York Social Services Law §366(2)(a)(8), as amended by chapters 480 and 481 of the laws of 1975] states in part:

360.7 Legally responsible relatives living apart from dependent relatives. [Additional statutory authority: Social Services Law, §§ 365a, 366] The ability of a spouse living apart from dependent relatives to contribute toward the cost of care of his or her spouse and of a parent living apart from dependent relatives to contribute toward the cost of care of his dependent child shall be ascertained as follows:

(a) The following income and resources shall be exempt and shall constitute a reserve for the legally responsible relative and members of his family household:

* * *

(5) income in an amount set forth in Schedule MA-2 of this Part:

ANNUAL NET INCOME—MINIMUM RESERVED FOR MAINTAINING OF FAMILY HOUSEHOLD OF LEGALLY RESPONSIBLE RELATIVES LIVING APART FROM APPLICANT OR RECIPIENT

Number of Family Members in Household Dependent on Income

One	*Two*	*Three*	*Four*	*Five*	*Six*	*Seven*
$2,500	$3,400	$4,000	$5,000	$5,700	$6,400	$7,200

* * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARION AITCHISON, et al., Plaintiffs-Appellees, -vs- STEPHEN BERGER, et al., Defendants, STEPHEN BERGER, Individually and as Commissioner of the Department of Social Services of the State of New York, Defendant-Appellant.	No. 75-7673 AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF MONROE) ss:

STEVEN L. BROWN, being duly sworn, deposes and says:

1. That he is not a party to this action, is over 18 years of age, and resides at 828 Grosvenor Road South, Rochester, New York.

2. That on the 28th day of January, 1976, he served the Brief for the Appellees in this action upon Hon. Louis J. Lefkowitz, Attorney General of the State of New York, Attn: Judith A. Gordon, Esq., attorney for the appellant in this action, at 2 World Trade Center, New York, New York 10047, the address designated by said attorney for that purpose, by depositing two true

copies of same enclose. in a post-paid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service in Rochester, New York.

Steven L. Brown

STEVEN L. BROWN

Sworn to before me this

25th day of January, 1976.

K. Wade Eaton

K. WADE EATON

My Commission expires

March 30, 1976.

Qualified in County of

Monroe, State of New York

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

MONROE COUNTY LEGAL ASSISTANCE CORP.
GREATER UP-STATE LAW PROJECT
Attorney for

Office and Post Office Address

80 West Main Street
ROCHESTER, NEW YORK 14614

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

MONROE COUNTY LEGAL ASSISTANCE CORP.
GREATER UP-STATE LAW PROJECT
Attorney for

Office and Post Office Address

80 West Main Street
ROCHESTER, NEW YORK 14614

To

Attorney(s) for

Index No. 75-7673 Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARION AITCHISON, et al.,

Plaintiffs-Appellees,

-vs-

STEPHEN BERGER, et al.,

Defendants,

STEPHEN BERGER, Individually and as Commissioner of the Department of Social Services of the State of New York, Defendant-Appellant.

AFFIDAVIT OF SERVICE

RENE H. REIXACH, ESQ.
MONROE COUNTY LEGAL ASSISTANCE CORP.
GREATER UP-STATE LAW PROJECT
Attorney for Plaintiffs-Appellees

Office and Post Office Address, Telephone

80 West Main Street
ROCHESTER, NEW YORK 14614
Tel. No. 454-6500

To

Attorney(s) for

Service of a copy of the within

is hereby admitted

Dated,

Attorney(s) for